Supreme Court, U.S.
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No. ____

# IN THE
# SUPREME COURT OF THE UNITED STATES

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STEVE SPURGEON,

Petitioner,

v.

ROBERT MOORE,

Respondent.

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On petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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## PETITIONER'S BRIEF

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Michael C. Kahrs
*Counsel of Record*
Law Office of
Michael C. Kahrs
753 N. 35th St., #102
Seattle, WA 98103
(206) 264-0643

## QUESTION PRESENTED FOR REVIEW

1. Should the Court define a valid challenge by a writ of habeas corpus to state custody in accordance with 28 U.S.C. § 2254(a) to include all direct but not collateral consequences of sentencing as defined by the state court, based upon the petitioner's conviction in state court.

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## I. INTRODUCTION

Petitioner Steven Spurgeon requests this Court issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals, whose final decision on the merits was issued October 12, 2004. Mr. Spurgeon is challenging by a writ of habeas corpus on a constitutional basis the post-judgment imposition of costs which were not part of the original criminal sentencing.

## II. OPINIONS BELOW

Petitioner's writ of habeas corpus challenging an imposition of a state statute, was filed on November 26, 1999, in the Western District of Washington. The writ was filed based upon 28 U.S.C. § 2254. After briefing, the magistrate judge filed a Report and Recommendation. App. A. The district court approved this recommendation. App. B.

The Ninth Circuit confirmed the district court's ruling in a memorandum ruling. Appendix C. Petitioner then filed a motion for rehearing, stay of judgment, and suggestion for rehearing en banc. The Ninth Circuit denied the rehearing. Appendix D.

## III. JURISDICTION

The Ninth Circuit Court of Appeals' final decision was filed on October 12, 2004. This petition is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## IV. FEDERAL PROVISIONS INVOLVED

Petitioner challenged the violations of his federal constitutional rights to the following in accordance with 28 U.S.C. § 2254:

1. Violation of the prohibition of due process;
2. Violation of the prohibition on ex post facto legislation;
3. Violation on the prohibition of Bill of Attainders; and
4. Violation of the prohibition against double jeopardy.

The issue presented requires examination of 28 U.S.C. §2254(a) which states as follows:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

## V. STATEMENT OF FACTS

Mr. Spurgeon was convicted of aggravated murder in the first degree in 1989 and was sentenced to life in prison without parole. The trial court imposed no financial obligations on Mr. Spurgeon as a result of his conviction.

In 1994, the Washington Legislature passed legislation which deducts prisoner's wages. Wash. Rev. Code § 72.09.111.[1] This statute mandates the following:

> (1) The secretary shall deduct taxes and legal financial obligations from the gross wages, gratuities, or workers' compensation benefits payable directly to the inmate under chapter 51.32 RCW, of each inmate working in

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[1] Wash. Rev. Code § 72.09.111 was effective June 30, 1994.

correctional industries work programs, or otherwise receiving such wages, gratuities, or benefits. The secretary shall also deduct child support payments from the gratuities of each inmate working in class II through class IV correctional industries work programs. The secretary shall develop a formula for the distribution of offender wages, gratuities, and benefits. The formula shall not reduce the inmate account below the indigency level, as defined in RCW 72.09.015.

(a) The formula shall include the following minimum deductions from class I gross wages and from all others earning at least minimum wage:

(I) Five percent to the public safety and education account for the purpose of crime victims' compensation;

(ii) Ten percent to a department personal inmate savings account;[2]

(iii) Twenty percent to the department to contribute to the cost of incarceration; and

(iv) Twenty percent for payment of legal financial

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[2] The mandatory savings requirement is not imposed on individuals like Mr. Spurgeon who are serving a sentence of life without parole. *See* Wash. Rev. Code § 72.09.111(2) which states:

> Any person sentenced to life imprisonment without possibility of release or parole under chapter 10.95 RCW or sentenced to death shall be exempt from the requirement under subsection (1)(a)(ii), (b)(ii), or (c)(ii).

> obligations for all inmates who have legal financial obligations owing in any Washington state superior court.

Subsequently, the Washington Legislature passed legislation requiring deductions from all funds received by an inmate other than through wages. Wash. Rev. Code § 72.09.480.[3] This Statute states in pertinent part:

> (2) When an inmate, except as provided in subsection (7) of this section, receives any funds in addition to his or her wages or gratuities, except settlements or awards resulting from legal action, the additional funds shall be subject to the following deductions and the priorities established in chapter 72.11 RCW:
>
> (a) Five percent to the public safety and education account for the purpose of crime victims' compensation;
>
> (b) Ten percent to a department personal inmate savings account;
>
> (c) Twenty percent to the department to contribute to the cost of incarceration;
>
> (d) Twenty percent for payment of legal financial obligations for all inmates who have legal financial obligations owing in any Washington state superior court; and
>
> (e) Fifteen percent for any child support owed under a support order.

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[3] Wash. Rev. Code § 72.09.480 was effective June 15, 1994.

Mr. Spurgeon worked for a Class I industry for many years. While so employed, Mr. Spurgeon earned an income.[4] There is no question that Mr. Spurgeon established for the record he suffered a significant deduction from his income as a consequence of the passage of these laws.

Petitioner, Steve Spurgeon, submitted a Personal Restraint Petition ("PRP")[5] to the Washington Court of Appeals Division I on June 22, 2001. In this petition, petitioner challenged the enactment of Wash. Rev. Code §§ 72.09.111 and 72.09.480, applied to Mr. Spurgeon subsequent to his conviction. The challenge was based on four state and federal constitutional challenges:

1. Violation of the prohibition of due process;
2. Violation of the prohibition on ex post facto legislation;
3. Violation on the prohibition of Bill of Attainders; and
4. Violation of the prohibition against double jeopardy.

The Washington Court of Appeals dismissed the petition. The Washington Supreme Court followed suit. The petition for writ of habeas corpus was timely filed in April, 2002, and was subsequently denied.

The magistrate recommended in the Report and Recommendation that the writ be denied, based upon the finding that a challenge to the "obligation to pay fines or restitution do not constitute a sufficient restraint on an

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[4] In 2004, the Washington Supreme Court deemed Class I industries to be a violation of the Washington Constitution's prohibition against prison labor. Washington Water Jet vs. Yarbrough, 151 Wn.2d 470, 90 P.3d 42 (Wash. 2004).

[5] A PRP is Washington State's standard method for post conviction challenges. *See* Washington Rules of Appellate Procedure, Title 16.

individual's liberty to satisfy the 'in custody' requirement of § 2254." This recommendation was followed by the district court.

On August 16, 2004, a panel of the Ninth Circuit issued a memorandum opinion, denying the appeal. In this opinion, the Panel upheld the district court's decision, stating that "this claim was not cognizable in a habeas petition." The Ninth Circuit Subsequently denied Mr. Spurgeon's Petition for Reconsideration and Hearing En Banc.

## VI. REASONS FOR GRANTING THE PETITION

Mr. Spurgeon contents this type of claim must be cognizable by a writ of habeas corpus for a state court prisoner. First, many states recognize that fines and restitution are considered a direct consequence of criminal liability. Second, because these financial burdens are direct consequences of state criminal liability and sentencing, any federal constitutional challenge to these consequences must first permit state courts to consider the federal constitutional implications in the interests in comity and as such, must be exhausted before presentation to the federal courts.

Last, the language of 28 U.S.C. § 2254 in contrast to 28 U.S.C. § 2255 provides support for the exhaustion requirement. To do otherwise would permit a criminal defendant to use the civil right statute, 42 U.S.C. § 1983, and bypass state courts.

### A. COSTS, FINES AND RESTITUTION ARE DIRECT CONSEQUENCES OF A CRIMINAL CONVICTION.

This Court has held that guilty pleas must be knowing, intelligent and voluntary because of the necessity to waive various constitutional rights. Boykin v. Alabama, 395 U.S. 238 (1969). This requirement, imposed on the states for many

years, has been integrated into criminal sentencing and requires a defendant to be informed of the direct consequences of a plea. In many states, including Washington, fines and restitution are a direct consequence of a criminal conviction and as such, the criminal defendant must be informed that restitution may be ordered before the sentencing court can accept a guilty plea. Washington v. Cameron, 30 Wn.App. 229, 233, 633 P.2d 901 (Wash.Ct.App. 1981); *see also* California v. Walker, 819 P.2d 8611 (Cal. 1991); Arizona v. Phillips, 152 Ariz. 533, 733 P.2d 1116 (Ariz. 1987); Nevada v. Cruzado, 879 P.2d 1195 (Nev. 1994); Nebraska v. War Bonnett, 428 N.W.2d 508 (Neb. 1988); People v. Nickerson, 293 N.W.2d 644 (Mich. 1980); Keller v. Wyoming, 723 P.2d 1244 (Wyo. 1986).[6] *But see* State v. Groppi, 840 A.2d 42 (Conn.App. 2004); New Jersey v. Rhoda, 503 A.2d 364 (N.J.Super.App.Div. 1986) (not a direct consequence). A direct consequence in Washington is defined based upon "whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Washington v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (Wash. 1980). This definition is accepted federally. *See* U.S. v. Amador-Leal, 276 F.3d 511, 514 (9th Cir. 2002).

In the Washington case, Washington v. Cameron, the restitution order was stricken because Cameron was not informed restitution could be ordered. Clearly, restitution and fees are considered punishment imposed upon the offender. However, because the trial court had not considered whether or not it would order a fine if restitution was not available, the

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[6] Rule 11(c), Federal Rules of Criminal Procedure, also requires a defendant be informed of "(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." *See* Holland v. United States, 584 A.2d 13, 15-16 (D.C. 1990) (a criminal defendant must be informed of any possible restitution).

case was remanded for resentencing.[7] Cameron, 30 Wn.App. at 233.[8]

Other costs, fines and restitution are imposed upon the convicted offender by various Washington statutes. *See* Wash. Rev. Code § 9.94A.760 (fees for court appointed attorney, expert or defense costs); Wash. Rev. Code § 9.94A.753 (restitution), Wash. Rev. Code § 7.68.035 (victim assessment), Wash. Rev. Code § 9.94A.760 (court costs). Because these economic penalties have a definite, immediate and automatic effect on the sentence, hence punishment, of the offender, they are a direct consequence of conviction. The State of Washington treats all these charges equally:

> "Court-ordered legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for payment of restitution to a victim, statutorily imposed crime victims compensation fee, court costs, a county or interlocal drug fund, court-appointed attorneys' fees and costs of defense, fines, and any other legal financial obligation that is assessed as a result of a felony conviction.

Wash. Rev. Code § 72.11.010(1).

As the challenge is to a subsequent statutory enactment on the direct consequences of his criminal conviction, Mr. Spurgeon is challenging an aspect of his custody.

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[7] Cameron was advised that the maximum sentence included the possibility of a fine of $10,000. Cameron, 30 Wn.App. at 230.

[8] Petitioner, from the State of Washington, cites Washington law but such logic is reflected in other states similar outcomes that have mandatory fines or restitution.

## B. COMITY REQUIRES STATE PRISONERS EXHAUST STATE REMEDIES WHEN CHALLENGING DIRECT CONSEQUENCES OF CRIMINAL CONVICTIONS.

It is an inappropriate remedy for criminal defendants to by pass state courts when challenging the direct consequences of a criminal conviction. This Court has previously examined cases involving the intersection between two remedies, writs of habeas corpus and civil rights actions. *See* Preiser v. Rodriguez, 411 U.S. 475 (1973); Heck v. Humphrey, 512 U.S. 477 (1994); Edward v. Balisok, 520 U.S. 641 (1997); Muhammad v. Close, 540 U.S. 749 (2004). Preiser first considered the overlap and held that habeas is the exclusive remedy for a prisoner challenging the length or legality of their detention. Preiser, 411 U.S. at 488-90.

In Heck, the plaintiff brought an action under 42 U.S.C. § 1983 seeking monetary damages based upon his conviction. Heck, 512 U.S. at 478-79. The challenge did not come directly under the holding of Preiser v. Rodriguez, 411 U.S. 475 (1973), which considered the overlap between the two forms of relief because Preiser was neither seeking immediate nor speedier release, but monetary damages. Heck, 512 U.S. at 481.[9]

Meeting the confluence of the two statutes head-on, this Court stated:

> Thus, the question posed by 1983 damage claims that do call into question the lawfulness of conviction or confinement remains open. To

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[9] While Preiser enunciated the rule regarding which procedure may be used to challenge various issues which arise upon conviction of a crime, in the discussion of the historical origins of the writ (which lay in release from confinement), this Court noted that the writ of habeas corpus is available for less obvious restraints. Preiser, *supra,* at 486 n.7.

> answer that question correctly, we see no need to abandon, as the Seventh Circuit and those courts in agreement with it have done, our teaching that 1983 contains no exhaustion requirement beyond what Congress has provided. The issue with respect to monetary damages challenging conviction is not, it seems to us, exhaustion, but rather, the same as the issue was with respect to injunctive relief challenging conviction in Preiser: whether the claim is cognizable under 1983, at all. We conclude that it is not.

Id. at 483 (citation removed). As a result, Heck and individuals like him are required to obtain relief through § 2254 first and then seek an economic remedy for the tort through § 1983.[10]

Heck follows the intent of Congress when that body said, "[t]his new section is declaratory of existing law as affirmed by the Supreme Court. (*See* Ex parte Hawk)." H.R. Rep. No. 308, 80th Cong., 1st Sess. v. 8, A180 (1948); *citing* Ex parte Hawk, 321 U.S. 114 (1944) (per curiam). Hawk affirms the exhaustion requirement for federal habeas purposes.

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[10] An analogy to the tort of malicious prosecution provided rationale. This Court stated:

> One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused. This requirement "avoids parallel litigation over the issues of probable cause and guilt . . ., and it precludes the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction.

Heck, 511 U.S. at 484 (quotations, citations removed).

> The denial of relief to petitioner by the federal courts and judges in this, as in a number of other cases, appears to have been on the ground that it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only "in rare cases where exceptional circumstances of peculiar urgency are shown to exist." To this, some courts have added the intimation that when the writ is sought by one held under a state conviction the only remedy ordinarily to be had in the federal court is by way of application to this Court for habeas corpus.

Id. at 117 (citations removed). The Senate weighed in on this issue, stating for the record:

> The second purpose is to eliminate, as a ground for Federal jurisdiction to review by habeas corpus judgments of state courts, the proposition that the State court has denied a prisoner a "fair adjudication of the legality of his detention under the Constitution and laws of the United States. The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

S. Rep. No. 1559, 80th Cong., 2nd Sess. v. 4, 14 (1948). Thus, the legislative focus of Congress was on exhaustion and comity, not confinement.

This holding was reinforced by this Court's subsequent decision in Balisok. In Balisok, a civil rights claim under 42 U.S.C. § 1983, plaintiff alleged a violation of his due process rights in the manner his good time credits had been rescinded. He did not seek restoration of the good time credits which would have required a habeas writ in accordance with Preiser v. Rodriguez. Balisok, 520 U.S. at 645; *citing* Preiser, 411 U.S. at 500. The Balisok court followed Heck and chose to consider comity over potential minimal damages:

> That principal is incorrect, since it disregards the possibility, clearly envisioned by Heck, that the nature of the challenge to the procedures could be such as necessarily to imply the invalidity of the judgment.

Balisok, 520 U.S. at 645. This ruling is consistent because any successful challenge to a fine or restitution mandates resentencing. Because a challenge to fees or restitution is a challenges to the validity of the judgment, the instant case clearly falls under Balisok and Heck.

Moreover, as this Court has made clear:

> [T]he statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that maybe granted. It provides that "[t]he court shall * * * dispose of the matter as law and justice require."

Carafas v. LaVallee, 391 U.S. 234, 239 (1968); *citing* 28 U.S.C.

§ 2243. Thus, the issue lies with the terms of the judgment and sentence which, as has been shown, require a petitioner, like Mr. Spurgeon, to exhaust his remedies before seeking relief in federal court.

This concern also drives the exhaustion requirement which is based upon principles of comity. As this Court has said, "[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." Picard v. Connor, 404 U.S. 270, 275 (1971) (*quoting* Darr v. Burford, 339 U.S. 200, 204 (1950)). The exhaustion requirement permits the state court "a fair opportunity" to consider each issue before presenting it to the federal court. Id. at 276; Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996). The interests of comity were confirmed by the passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA").

The AEDPA changed the habeas statutes, 28 U.S.C. §2241 *et seq.*, by clearly limiting the federal courts' consideration of state court cases. A habeas petitioner must now demonstrate that the state court's adjudication of the merits

> resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. §2254(d)(1).

Congress designed § 2254(d), to combat the view "that State court judges are not *as qualified* as Federal judges," 142 Cong. Rec. S3447 (April 17, 1996) (Sen. Hatch) (emphasis added). " 'Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly

established federal law erroneously or incorrectly.' Rather, that application must be objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003) (*quoting* Williams v. Taylor, 529 U.S. 362, 411 (2000)).

Given Congress' intent to provide state courts with the first examination of federal constitutional issues based upon a challenge to a criminal conviction and its direct consequences, it follows that Mr. Spurgeon pursued the correct avenue of relief when filing his habeas writ. Having given the state courts their opportunity to consider the constitutional challenges on the merits, he has now petitioned the federal courts to conduct a review of those decisions. This procedure clearly meets the interests of comity and the intent of Congress.

### C. A STATUTORY COMPARISON BETWEEN 28 U.S.C. § 2254 AND § 2255 SHOWS NO INTENT TO LIMIT THE ISSUES HABEAS CORPUS EXAMINES BEYOND THE REQUIREMENT THERE BE RESTRAINT.

Congress' intent when enacting 28 U.S.C. § 2254 must be considered in light of 28 U.S.C. § 2255. Section 2255 specifies the following requirement for a federal prisoner to ask for relief:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move

> the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). Of critical importance is the language which specifically limits the right to questions of release. All federal circuits, including the Ninth Circuit, have accepted this interpretation. *See* United States v. Kramer, 195 F.3d 1128 (9th Cir. 1994); In Kramer, the Ninth Circuit stated:

> We agree with our sister circuits and join them in holding that by its plain terms, § 2255 is available only to defendants who are in custody and claiming the right to be released. It cannot be used solely to challenge a restitution order.

Id. at 1130. However, nowhere does the language if 28 U.S.C. § 2254(a) state that habeas relief is limited to challenges on the right to be released. Instead the critical section states:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

It is the language where a petitioner challenges "on the ground that he is in custody in violation . . . " that is the crucial determination when a court decides this issue.

When two statutes exist side by side, and one of the statutes does not address a specific issue the other does, a presumption exists as to its exclusion.

> [W]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed.

Richerson v. Jones, 551 F.2d 918, 928 (3rd Cir. 1977); *quoting* General Electric Co. v. Southern Construction Co., 383 F.2d 135, 138 n. 4 (5th Cir. 1967). Clearly, the intent of Congress was to accomplish two separate goals.

## VII. CONCLUSION

In conclusion, a writ of habeas corpus is the appropriate procedural process by which any individual convicted in state court must challenge any direct consequence of a criminal conviction. For the reasons set forth above, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 9th day of January, 2005.

MICHAEL C. KAHRS
*Counsel for Petitioner*
The Law Office of
Michael C. Kahrs
753 N. 35th St., Suite 102
Seattle, WA 98103
(206) 264-0643

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN SPURGEON,
Petitioner,
v.
ROBERT MOORE,
Respondent.

CASE NO. C02-984C

REPORT AND RECOMMENDATION

Petitioner is a state prisoner who is currently in custody at the Washington State Reformatory in Monroe, Washington, Petitioner has field a petition for federal habeas relief under 28 U.S.C. § 2254 to challenge the constitutionality of the statutory scheme which permits the Washington Department of Corrections to deduct from his wages, and other income, monies to contribute to the costs of his incarceration. Respondent has filed a response to the petition in which he argues that petitioner's claims are not cognizable under § 2254 because petitioner seeks to challenge only statutory financial obligations and deductions and not his confinement. Respondent is correct.

Section 2254(a) provides that the federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Thus, subject matter jurisdiction under 28 U.S.C. § 2254 is limited to those persons 'in custody" pursuant to the judgment of a State court." 28 U.S.C. § 2254(a); *Brock v. Weston*, 31 F.3d 887, 889 (9th Cir. 1994). In General, courts have held that the obligation

to pay fines or restitution do not constitute a sufficient restraint on an individual's liberty to satisfy the "in custody" requirement of § 2254. *See Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998); *United State v. Kramer*, 195 F.3d 1129, 1130 (9th Cir. 1999); *Dremann v. Francis*, 828 F.2d 6,7 (9th Cir. 1987).

While petitioner is "in custody" as a result of his confinement, he does not claim the right to be released from his confinement in his federal habeas petition. Instead, petitioner claims that the statutory financial obligations and deductions that have been imposed upon him during his incarceration are unconstitutional. As petitioner does not claim the right to be released in his federal habeas petition, his claims are not cognizable under § 2254. See Kramer, 195 F.3d at 1130 (section 2255, by its plain terms, is applicable only to prisoners in custody claiming the right to be released and not to those who seek to challenge only fines and restitution orders). Accordingly, this Court recommends that petitioner's federal habeas petition be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 18 day of February, 2003.

/S/ John E. Weinberg
United States Magistrate Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN SPURGEON,
Petitioner,
v.
ROBERT MOORE,
Respondent.

CASE NO. C02-984C

ORDER

This matter comes before the Court on the Report and Recommendation of the Honorable John L. Weinberg, United States Magistrate Judge (DDT. No. 26), petition's timely objections to that Report and Recommendation (DDT. No. 28), and respondeat's response to petitioner's objections (DDT. No. 29). The Court hereby finds and rules as follows

Petitioner brings this petition for habeas relief under 28 U.S.C. § 2254 challenging the constitutionality of the statutory scheme which permits the Washington Department of Corrections to deduct from his wages, and other income. Judge Weinberg in his Report and Recommendation correctly concludes that petitioner's claims are not cognizable under § 2254 because he seeks to challenge only financial obligations and deductions mandated by statute rather than his judgment and sentence. The Ninth Circuit has generally held that the obligation to pay fines or restitution does not meet the "in custody" requirement of § 2254(a). See, e.g., Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th cir. 1998). Petitioner in his objections has failed to persuade the Court that his petition is cognizable under § 2254.

Accordingly, the Court adopts the Report and Recommendation. Petitioner's federal habeas petition is DENIED and this action is DISMISSED with prejudice. The Clerk is directed to send copies of this Order to petitioner, counsel for the respondent, and to Judge Weinberg.

SO ORDERED this 23 day of April, 2003.

/S/ John C. Coughenour
Chief United States District Judge

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**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN SPURGEON,
Petitioner-Appellant,
v.
ROBERT MOORE,
Respondent-Appellee.

No. 03-35558
DC No. CV-02-984-JCC

MEMORANDUM*
Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, Chief Judge, Presiding

Submitted August 9, 2004**

Before: SCHROEDER, Chief Judge, RAWLINSON and Callahan, Circuit Judges

Stephen Spurgeon, a Washington state prisoner, appeals the dismissal of his habeas corpus petition brought under 28 U.S.C. § 2254. He challenges the constitutionality of the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 26-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

statutory scheme that permits the Washington Department of Corrections to deduct, from his wages and other income, money to contribute to the cost of his incarceration. *See* Wash.Rev.Code §§ 72.09.111, 72.09.480. The district court correctly concluded this claim was not cognizable in a habeas petition. *See* 28 U.S.C. § 2254(a) (a court shall entertain a habeas petition "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States"); *United States v. Thiele*, 314 F.3d 399, 410 (9th Cir. 2002) (interpreting 28 U.S.C. § 2255).

**AFFIRMED.**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN SPURGEON,
Petitioner-Appellant,
v.
ROBERT MOORE,
Respondent-Appellee.

No. 03-35558
DC No. CV-02-984-JCC

ORDER

Before: SCHROEDER, Chief Judge, RAWLINSON and Callahan, Circuit Judges

The panel has voted to deny appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are denied.

RCW 7.68.035 (In pertinent part)

(1) (a) When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

(b) When any juvenile is adjudicated of any offense in any juvenile offense disposition under Title 13 RCW, except as provided in subsection (2) of this section, there shall be imposed upon the juvenile offender a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be one hundred dollars for each case or cause of action that includes one or more adjudications for a felony or gross misdemeanor and seventy-five dollars for each case or cause of action that includes adjudications of only one or more misdemeanors.

RCW 9.94A.753 (In pertinent part)

This section applies to offenses committed after July 1, 1985.
(1) When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days except as provided in subsection (7) of this section. The court may continue the hearing beyond the one hundred eighty days for good cause. The court shall then set a minimum monthly payment that the offender is required to make towards the restitution that is ordered. The court should

take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(2) During the period of supervision, the community corrections officer may examine the offender to determine if there has been a change in circumstances that warrants an amendment of the monthly payment schedule. The community corrections officer may recommend a change to the schedule of payment and shall inform the court of the recommended change and the reasons for the change. The sentencing court may then reset the monthly minimum payments based on the report from the community corrections officer of the change in circumstances.

RCW 9.94A.760 (In pertinent part)
Legal financial obligations.

(1) Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law. On the same order, the court is also to set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligation. If the court fails to set the offender monthly payment amount, the department shall set the amount if the department has active supervision of the offender, otherwise the county clerk shall set the amount. Upon receipt of an offender's monthly payment, restitution shall be paid prior to any payments of other monetary obligations. After restitution is satisfied, the county clerk shall distribute the payment proportionally among all other fines, costs, and assessments imposed, unless otherwise ordered by the court.

(2) If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars per day of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision shall take precedence over the payment of the cost of incarceration ordered by the court. All funds recovered from offenders for the cost of incarceration in the county jail shall be remitted to the county and the costs of incarceration in a prison shall be remitted to the department.

RCW 72.09.015
Definitions.

(10) "Indigent inmate," "indigent," and "indigency" mean an inmate who has less than a ten-dollar balance of disposable income in his or her institutional account on the day a request is made to utilize funds and during the thirty days previous to the request.

RCW 72.09.111 (In pertinent part)

(1) The secretary shall deduct taxes and legal financial obligations from the gross wages, gratuities, or workers' compensation benefits payable directly to the inmate under chapter 51.32 RCW, of each inmate working in correctional industries work programs, or otherwise receiving such wages, gratuities, or benefits. The secretary shall also deduct child support payments from the gratuities of each inmate working in class II through class IV correctional industries work programs. The secretary shall develop a formula for the distribution of offender wages, gratuities, and benefits. The formula shall not reduce the inmate account below the indigency level, as defined in RCW 72.09.015.

(a) The formula shall include the following minimum deductions from class I gross wages and from all others earning at least minimum wage:

(i) Five percent to the public safety and education account for the purpose of crime victims' compensation;

(ii) Ten percent to a department personal inmate savings account;

(iii) Twenty percent to the department to contribute to the cost of incarceration; and

(iv) Twenty percent for payment of legal financial obligations for all inmates who have legal financial obligations owing in any Washington state superior court.

(b) The formula shall include the following minimum deductions from class II gross gratuities:

(i) Five percent to the public safety and education account for the purpose of crime victims' compensation;

(ii) Ten percent to a department personal inmate savings account;

(iii) Fifteen percent to the department to contribute to the cost of incarceration;

(iv) Twenty percent for payment of legal financial obligations for all inmates who have legal financial obligations owing in any Washington state superior court; and

(v) Fifteen percent for any child support owed under a support order.

(c) The formula shall include the following minimum deductions from any workers' compensation benefits paid pursuant to RCW 51.32.080:

(i) Five percent to the public safety and education account for the purpose of crime victims' compensation;

(ii) Ten percent to a department personal inmate savings account;

(iii) Twenty percent to the department to contribute to the cost of incarceration; and

(iv) An amount equal to any legal financial obligations owed by the inmate established by an order of any Washington state superior court up to the total amount of the award.

(d) The formula shall include the following minimum deductions from class III gratuities:

(i) Five percent for the purpose of crime victims' compensation; and

(ii) Fifteen percent for any child support owed under a support order.

(e) The formula shall include the following minimum deduction from class IV gross gratuities:

(i) Five percent to the department to contribute to the cost of incarceration; and

(ii) Fifteen percent for any child support owed under a support order.

(2) Any person sentenced to life imprisonment without possibility of release or parole under chapter 10.95 RCW or sentenced to death shall be exempt from the requirement under subsection (1)(a)(ii), (b)(ii), or (c)(ii).

RCW 72.09.480 (In pertinent part)

(1) Unless the context clearly requires otherwise, the definitions in this section apply to this section.

(a) "Cost of incarceration" means the cost of providing an inmate with shelter, food, clothing, transportation, supervision, and other services and supplies as may be necessary for the maintenance and support of the inmate while in the custody of the

department, based on the average per inmate costs established by the department and the office of financial management.

RCW 72.11.010 (In pertinent part)

Unless a different meaning is plainly required by the context, the following words and phrases as hereafter used in this chapter shall have the following meanings:

(1) "Court-ordered legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for payment of restitution to a victim, statutorily imposed crime victims compensation fee, court costs, a county or interlocal drug fund, court-appointed attorneys' fees and costs of defense, fines, and any other legal financial obligation that is assessed as a result of a felony conviction.